



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 29, 2022

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BOARD DECISIONS

Appellant: Arnold Wilson

Agency: Department of Veterans Affairs

Decision Number: [2022 MSPB 7](#)

Docket Number: AT-0714-19-0113-I-1

Issuance Date: April 26, 2022

Appeal Type: Removal, Demotion, or Suspension by DVA

TIMILENESS & 38 U.S.C. § 714

RETROACTIVITY & 38 U.S.C. § 714

DANGER TO PUBLIC HEALTH OR SAFETY

CLEAR AND CONVINCING EVIDENCE

The agency demoted the appellant under 38 U.S.C. § 714 for neglect of duty. Its decision letter advised the appellant that he had 10 days to appeal to the Board or 45 days to seek equal employment opportunity (EEO) counseling. Within 10 days, the appellant amended a pending EEO complaint to include his demotion. Many months later, after the agency failed to issue a final decision on that complaint, the appellant filed a Board appeal to challenge his demotion. The administrative judge reversed. She found that the appeal was timely, and the agency failed to prove its charge. The administrative judge also found that the

appellant's affirmative defenses did not warrant any additional relief.

Holding: The appellant's appeal was timely.

1. Although the VA Accountability Act includes a 10-business day deadline for filing a Board appeal, it is silent as to the procedures and timeliness requirements for employees that file mixed-case complaints of discrimination followed by appeals to the Board. Recognizing the same, the Board analyzed the VA Accountability Act, 38 U.S.C. § 714, along with the statute providing for mixed-case appeal rights, 5 U.S.C. § 7702, and found that the two could coexist. In the absence of a formal complaint of discrimination, the 10-business day limit applies. But if the employee first filed a formal complaint of discrimination, and the agency has not issued a decision within 120 days, the time limit provided in 5 U.S.C. § 7702(e)(2) applies to any subsequent Board appeal.
2. The Board further found that election of remedy principles apply. Thus, the appellant was entitled to initially file a direct Board appeal or an EEO complaint with the agency, but not both, and whichever was first filed was his election to proceed in that forum. But because the agency failed to issue a final decision on his EEO complaint within 120 days, the appellant's could then file his Board appeal.

Holding: The agency improperly demoted the appellant under 38 U.S.C. § 714 for conduct that predated the VA Accountability Act.

1. Rather than addressing the administrative judge's determination that the agency failed to prove an element of its neglect of duty charge, the Board recognized the Federal Circuit's decision in *Sayers v. Department of Veterans Affairs*, 954 F.3d 1370 (Fed. Cir. 2020), which was issued after the administrative judge's initial decision in this appeal. Based on *Sayers*, the Board determined that the agency's 714 action could not stand, because it relied upon conduct that occurred before the passage of section 714.
2. The Board recognized that a small portion of the appellant's alleged misconduct occurred after the passage of 714. Nevertheless, the Board found that the agency's charge could not be sustained, because the facts were so interrelated, and the agency's charge did not distinguish between conduct occurring before and after the passage of 714.

Holding: The appellant was entitled to corrective action for whistleblower retaliation.

1. The administrative judge correctly found that the appellant reasonably believed his disclosures about equipment breakdowns involving sterilizers that could delay the availability of reusable medical equipment were protected—they constituted a disclosure of substantial and specific danger to public health and safety. Among other things, the record included evidence showing that surgeons had related concerns, dozens of surgeries were cancelled and rescheduled, and different surgical approaches were sometimes employed, all because of insufficient sterilized instruments.
2. The administrative judge correctly found that the appellant's disclosures were a contributing factor in his demotion based on the knowledge/timing test.
3. The agency failed to rebut the appellant's prima facie case of whistleblower reprisal. Concerning the first factor considered, the strength of the agency's evidence in support of the demotion action, the Board agreed with the administrative judge's determination that the agency's evidence was not strong. Concerning the second factor considered, the existence and strength of any motive to retaliate, the Board disagreed with the administrative judge's determination that this favored the agency. Based on the particular facts of this case, the Board instead found that this factor instead weighed in the appellant's favor. Concerning the third factor considered, any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated, the administrative judge found that this weighed slightly in the agency's favor. The Board disagreed because the record did not show that the individuals cited for comparison purposes were nonwhistleblowers, rendering the comparisons irrelevant. Weighing these factors together, the Board concluded that the agency failed to meet its burden.

COURT DECISIONS

NONPRECEDENTIAL:

Payne v. U.S. Postal Service, [No. 2022-1419](#) (Fed. Cir. Apr. 22, 2022) (MPSB Docket No. PH-3443-21-0363-I-1) While his appeal was still pending before an administrative judge for the Board, with case processing temporarily suspended

to allow the parties to prepare for a hearing, the appellant filed a petition with the court. The court dismissed the petition as premature.

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